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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R09-OAR-2013-0686; FRL 9916-12-Region 9]

**Approval and Promulgation of Implementation Plans and
Designation of Areas for Air Quality Planning Purposes;
State of Arizona; Redesignation of Phoenix-Mesa Area to
Attainment for the 1997 8-Hour Ozone Standard**

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving, as a revision to the Arizona state implementation plan, a request from the Arizona Department of Environmental Quality to redesignate the Phoenix-Mesa ozone nonattainment area to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or "standard") because the request meets the statutory requirements for redesignation under the Clean Air Act. EPA is also approving the State's plan for maintaining the 1997 ozone standard in the Phoenix-Mesa area for 10 years beyond redesignation, and the inventories and related motor vehicle emissions budgets within the plan, because they meet the applicable requirements for such plans and budgets.

DATES: This final rule is effective on [Insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action: Docket ID No. EPA-R09-OAR-2013-0686. Generally, documents in the docket for this action are available electronically at www.regulations.gov and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at www.regulations.gov, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

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SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," or "our" refer to EPA.

Table of Contents

I. Summary of Proposed Action

A. Determination that the Area Has Attained the Applicable NAAQS

- B. Determination that the Area Has a Fully Approved SIP Meeting Requirements Applicable for Purposes of Redesignation Under Section 110 and Part D
- C. Determination that the Improvement in Air Quality in the Area Is Due to Permanent and Enforceable Emissions Reductions
- D. Approval of the Maintenance Plan for the Area Under CAA Section 175A

II. Responses to Comments on the Proposed Rule

III. Final Action

IV. Statutory and Executive Order Reviews

I. Summary of Proposed Action

On March 26, 2014 (79 FR 16734), we proposed to take several related actions. First, under Clean Air Act (CAA or "Act") section 110(k)(3), EPA proposed to approve a March 23, 2009 submittal from the Arizona Department of Environmental Quality (ADEQ) of the Maricopa Association of Governments' (MAG's) plan titled "*MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area*," (February 2009) ("Eight-Hour Ozone Maintenance Plan") as a revision to the Arizona state implementation plan (SIP).¹

¹ The Phoenix-Mesa 8-hour ozone nonattainment area is sometimes referred to as the Maricopa nonattainment area. The precise boundaries of the area are found at 40 CFR 81.303.

In connection with the Eight-Hour Ozone Maintenance Plan, EPA proposed to find that the maintenance demonstration showing that the area will continue to attain the 1997 8-hour ozone NAAQS² for 10 years beyond redesignation (i.e., through 2025) and the contingency provisions meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. EPA also proposed to find adequate and approve the motor vehicle emissions budgets (MVEBs) in the Eight-Hour Ozone Maintenance Plan because we found that they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

Second, under CAA section 107(d)(3)(D), EPA proposed to approve ADEQ's request that accompanied the submittal of the maintenance plan to redesignate the Phoenix-Mesa 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS. We did so based on our proposed approval of the Eight-Hour Ozone Maintenance Plan, and our conclusion that the area has met the criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion was based on our determination that the area has attained the 1997 8-hour ozone NAAQS, that relevant portions of the Arizona SIP are fully approved, that the improvement in air quality is due to permanent and enforceable reductions in emissions, and that Arizona has met all the section 110 and part

² The 1997 8-hour ozone standard is 0.08 parts per million (ppm) averaged over an 8-hour time frame. Ground-level ozone is an oxidant that is formed from photochemical reactions in the atmosphere between volatile organic compounds (VOC) and oxides of nitrogen (NO_x) in the presence of sunlight.

D requirements of the CAA that are applicable to the Phoenix-Mesa 8-hour ozone nonattainment area for purposes of redesignation.

For the purposes of this final rule, we have summarized the basis for our findings in connection with the proposed approvals of the Eight-Hour Ozone Maintenance Plan and redesignation request. For a more detailed explanation as well as background information concerning the 1997 8-hour ozone NAAQS, the CAA requirements for redesignation, and the ozone planning history of the Phoenix-Mesa area, please see our March 26, 2014, proposed rule.

A. Determination that the Area Has Attained the Applicable NAAQS

Prior to redesignating an area to attainment, CAA section 107(d)(3)(E)(i) requires that we determine that the area has attained the NAAQS. For our proposed rule, consistent with the requirements contained in 40 CFR part 50, EPA reviewed the ozone ambient air monitoring data for the monitoring period from 2010 through 2012, as recorded in the EPA Air Quality System (AQS) database, and determined, based on the complete, quality-assured, and certified data for 2010-2012, that the Phoenix-Mesa 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard because the design value³ is less than 0.084 ppm.⁴

³ The design value for the 8-hour standard is the three-year average of the annual fourth-highest daily maximum 8-hour ozone concentration at the worst-case monitoring site in the area. When the design value is less than or equal

We also reviewed preliminary data from 2013 and found that it was consistent with continued attainment of the standard in the Phoenix-Mesa area. See pages 16737-16739 of our March 26, 2014 proposed rule.

In the proposed rule, we anticipated that by the time we took final action, data for year 2013 would be certified, and that preliminary data for a portion of year 2014 would be available. In anticipation of the newly certified and available data, we also indicated that, in our final action, we would update our attainment determination for the Phoenix-Mesa area based on complete, certified data for 2011-2013 and would review preliminary data for 2014. As expected, the relevant certifications have been submitted,⁵ and based on review of complete, certified data for 2011-2013, we find that the 8-hour ozone design value for 2011-2013 for the Phoenix-Mesa area is 0.081 parts per million (ppm) based on the data from the monitoring site (North Phoenix) recording the highest design value among the various monitoring sites within the nonattainment area. Like the design value for 2010-2012

to 0.084 ppm (based on the rounding convention in 40 CFR part 50, appendix I) at each monitoring site within the area, the area is meeting the 1997 8-hour ozone NAAQS.

⁴ Our proposed rule also includes a table (at page 16743, table 2) that shows that design values have been consistent with attainment of the 1997 ozone standard since the 2005-2007 period.

⁵ See letters from Michael Sundblom, Air Quality Director, Pinal County Air Quality Control District, dated April 21, 2014; Eric C. Massey, Director, Air Quality Division, ADEQ, dated May 30, 2014; and Dennis Dickerson, Acting Director, Maricopa County Air Quality Department, dated June 3, 2014.

documented in the proposed rule, the design value for 2011-2013 is below 0.084 ppm, and is, thus, consistent with attainment of the 1997 ozone NAAQS. Preliminary data for 2014 are also consistent with continued attainment.

B. Determination that the Area Has a Fully Approved SIP Meeting Requirements Applicable for Purposes of Redesignation Under Section 110 and Part D

Sections 107(d)(3)(E)(ii) and (v) of the CAA require EPA to determine that the area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation. For the reasons summarized below, we find that the Phoenix-Mesa area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation. See pages 16739-16741 of our March 26, 2014 proposed rule.

With respect to section 110 of the CAA (General SIP Requirements), we conclude that the Phoenix-Mesa portion of the approved SIP, which includes rules pertaining to areas and sources under the jurisdiction of ADEQ, the Maricopa County Air Quality Department (MCAQD), and the Pinal County Air Quality Control District (PCAQCD), meet all SIP requirements for the Phoenix-Mesa area that are applicable for purposes of

redesignation. Our conclusion in this regard is based on our review of the Phoenix-Mesa portion of the Arizona SIP.

With respect to part D (of title I of the CAA), we reviewed the Phoenix-Mesa portion of the Arizona SIP for compliance with applicable requirements for nonattainment areas under both subparts 1 and 2.⁶ First, we note that EPA previously approved the Eight-Hour Attainment Plan for the Phoenix-Mesa area based upon the determination that it met all applicable requirements for such plans under subpart 1 of part D, title 1 of the CAA for the 1997 8-hour ozone NAAQS (77 FR 35285, June 13, 2012), including the requirements for an emissions inventory, for contingency measures, and for demonstrations of implementation of reasonably available control measures, of reasonable further progress, and of attainment by the applicable attainment date. As to the other applicable subpart 1 requirements, we find that:

- Arizona has met the nonattainment applicable New Source Review (NSR) requirements for the Phoenix-Mesa eight-hour ozone nonattainment area because rules meeting the fundamental nonattainment NSR requirements for ozone nonattainment areas are approved in the Arizona SIP; and
- The requirements for transportation conformity SIPs under section 176(c) do not apply for the purposes of a

⁶ Subpart 1 contains general, less prescriptive requirements for all nonattainment areas of any pollutant, including ozone, governed by a NAAQS. Subpart 2 contains additional, more specific requirements for ozone nonattainment areas classified under subpart 2.

redesignation request under section 107(d)(3) because state conformity rules are still required after redesignation and federal conformity rules apply where state rules have not been approved.⁷

With respect to the requirements associated with subpart 2, we noted that the Phoenix-Mesa 8-hour ozone nonattainment area was initially designated nonattainment under subpart 1 of the CAA, but was classified as marginal nonattainment for the 1997 8-hour ozone standard under subpart 2 of part D of the CAA in May 2012,⁸ i.e., after Arizona's submittal of the redesignation request. Under EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time a redesignation request is submitted, and in consideration of the inequity of applying retroactively any requirements that might in the future be applied, we determined that the additional requirements for marginal nonattainment areas do not apply to the Phoenix-Mesa 8-hour ozone nonattainment area for the purposes of redesignation.

C. Determination that the Improvement in Air Quality in the Area Is Due to Permanent and Enforceable Emissions Reductions

Section 107(d)(3)(E)(iii) precludes redesignation of a nonattainment area to attainment unless EPA determines that the

⁷ See *Wall v. EPA*, 265 F.3d 426, 439 (6th Cir. 2001) upholding this interpretation.

⁸ 77 FR 28424, May 14, 2012.

improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable federal air pollution control regulations and other permanent and enforceable regulations. Based on our review of the control measures that provided for attainment of the now-revoked one-hour ozone NAAQS in the Phoenix metropolitan area and the additional control measures adopted and approved for attainment of the 1997 8-hour ozone standard, and based on our consideration of other factors such as weather patterns and economic activity,⁹ we find that the improvement in air quality in the Phoenix-Mesa area is the result of permanent and enforceable emissions reductions from a combination of numerous EPA-approved State and local stationary source and mobile source control measures, along with federal motor vehicle and nonroad control programs. See pages 16741-16742 of our March 26, 2014 proposed rule.

D. Approval of the Maintenance Plan for the Area Under CAA

Section 175A

Section 107(d)(3)(E)(iv) precludes EPA from redesignating an area from nonattainment to attainment unless EPA has fully

⁹ Specifically, we reviewed temperature data to determine if unusual meteorological conditions could have played a significant role in attaining the 1997 ozone standard in the Phoenix-Mesa area and determined that unusually favorable meteorology did not play a significant role. We also discussed the economic slowdown affecting the Phoenix-Mesa area starting in 2008 but noted that the downward trend in ozone concentrations had already been established well before that time.

approved a plan for maintaining compliance with the NAAQS. The required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment are set forth in CAA section 175A. As explained in the proposed rule, we interpret this section of the Act to require, in general, the following core elements: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and contingency plan.

Based on our review and evaluation of the Eight-Hour Ozone Maintenance Plan, we conclude that it contains the core elements and meets the requirements of CAA section 175A. See pages 16742-16748 of our proposed rule. Our conclusion was based on the following findings:

- The base year emissions inventory for 2005 is comprehensive, the methods and assumptions used by MAG to develop the 2005 emission inventory are reasonable, and the inventory reasonably estimates actual ozone season emissions in an attainment year. Moreover, we found that the 2005 emissions inventories reflect the latest planning assumptions and emissions models available at the time the plan was developed, and provide a comprehensive and reasonably accurate basis upon which to forecast ozone precursor emissions for years 2019 and 2025;

- MAG's photochemical modeling adequately demonstrates maintenance for at least 10 years after redesignation to attainment;
- The Eight-Hour Ozone Maintenance plan indicates that ADEQ and MCAQD will continue to operate an appropriate air quality monitoring network to verify the continued attainment of the 1997 8-hour ozone NAAQS;
- The continued operation of an ozone monitoring network and the requirement that MCAQD, with input from ADEQ, Arizona DOT, and MAG, must inventory emissions sources and report to EPA on a periodic basis¹⁰ are sufficient for the purpose of verifying continued attainment; and
- The contingency provisions of the Ozone Maintenance Plan identify specific contingency measures,¹¹ contain tracking and triggering mechanisms to determine when contingency measures are needed, contain a sufficient description of the process of recommending and implementing contingency measures, and contain specific timelines for action, and will, therefore, be adequate to ensure prompt correction of

¹⁰ See 40 CFR part 51, subpart A ("Air Emissions Reporting Requirements").

¹¹ The Eight-Hour Ozone Maintenance Plan includes both specific contingency measures (such as the Gross Polluter Option for I/M Program Waivers, Increased Waiver Repair Limit Options, and Federal Heavy Duty Diesel Vehicle Emissions Standards, among others) that have already been adopted and are being implemented early, and a mechanism to trigger the adoption of additional measures as needed. See pages 3-21 and 3-22 of the Eight-Hour Ozone Maintenance Plan.

a violation and comply with the contingency-related requirements under CAA section 175A(d).

Lastly, we find adequate and are approving the motor vehicle emissions budgets (MVEBs) contained in the Eight-Hour Ozone Maintenance Plan because we find that they meet the transportation conformity adequacy requirements under 40 CFR 93.118(e)(4) and (5). Specifically, we find that, among other things, the MVEBs, when considered with emissions from all other sources, would be consistent with maintenance of the 1997 8-hour ozone NAAQS in the Phoenix-Mesa area for ten years beyond redesignation.

II. Responses to Comments on the Proposed Rule

EPA's March 26, 2014 proposed rule provided a 30-day public comment period. During this period, we received two comment letters. One comment letter was from a member of the public who supports EPA's proposed actions. The other letter, from Sierra Club, opposes the proposed actions. A summary of Sierra Club's comments and EPA's responses are provided below.

Comment: The Sierra Club contends that EPA must disapprove the State of Arizona's redesignation request for the Phoenix-Mesa 1997 8-hour ozone nonattainment area because the inclusion of State and Maricopa County rules in the Arizona SIP that provide an affirmative defense potentially applicable to violations due to excess emissions that occur during startup,

shutdown, and malfunction ("SSM events") prevents EPA from determining that all applicable Clean Air Act requirements under section 107(d)(3)(E) for redesignations have been met.

Specifically, Sierra Club contends that the affirmative defense provisions in the Arizona SIP prevent EPA from determining:

- that the improvement in air quality is due to enforceable reductions as required under section 107(d)(3)(E)(iii) because the affirmative defense provisions applicable during SSM events make emission reductions unenforceable;
- that the maintenance plan demonstrates maintenance of the NAAQS as required under sections 107(d)(3)(E)(iv) and 175A(a) when emissions can increase above the emission inventory and allowable levels during SSM events; and
- that the State has met all requirements applicable to the area under section 110 and part D as required under sections 107(d)(3)(E)(v) and 110(a)(2)(A) because the emission limits in the SIP, at least during SSM events, are not enforceable because of the affirmative defense provisions.

In support of this claim, the Sierra Club notes that EPA has found in other actions¹² that illegal SSM provisions related

¹² The commenter cites two Federal Register documents: a proposed disapproval of redesignation requests and maintenance plans for Salt Lake County, Utah County, and Ogden City, Utah PM₁₀ nonattainment areas (74 FR 62717, December

to emissions during SSM events constituted grounds for denying redesignation requests. Moreover, the Sierra Club notes that EPA has proposed a SIP call for both the State and Maricopa County affirmative defense provisions applicable during startup and shutdown events based on a finding that such provisions are inconsistent with the CAA. Sierra Club also cites a recent D.C. Circuit Court of Appeals decision (*Natural Resources Defense Council v. EPA*, No. 10-1371 (D.C. Cir, Apr. 18, 2014 - "Cement Kiln Decision"),¹³ as standing for the principle that affirmative defense provisions, even those applicable only during malfunctions, are inconsistent with the requirements of the Clean Air Act because such provisions purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violation in contravention of sections 113 and 304. Lastly, Sierra Club includes a recent District Court opinion as an example of a citizen enforcement action undermined by the presence in a SIP of affirmative defense provisions applicable during malfunction events.¹⁴

1, 2009), and a final rule requiring Utah to revise SSM provisions in its SIP (76 FR 21639, April 18, 2011).

¹³ The *Cement Kiln Decision* involved a challenge to EPA's National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 78 FR 10006 (February 12, 2013), in which EPA included an affirmative defense to civil penalties for violations of emissions standards that result from unavoidable malfunctions. In the *Cement Kiln Decision*, the Court vacated the portion of the 2013 rule pertaining to the affirmative defense.

¹⁴ *Sierra Club v. Energy Future Holdings Corp.*, No. W-12-cv-108, W.D. Tex., memorandum opinion and order filed March 28, 2014.

Response: EPA does not agree that the affirmative defense provisions in the State and Maricopa County portions of the Arizona SIP provide a basis for disapproving the redesignation request for the Phoenix-Mesa nonattainment area for the 1997 8-hour ozone standard for the reasons set forth below.

The CAA sets forth the general criteria for redesignation of an area from nonattainment to attainment in section 107(d)(3)(E). These criteria include a determination by EPA that the area has attained the relevant standard [section 107(d)(3)(E)(i)] and that EPA has fully approved the applicable implementation plan for the area for purposes of redesignation [section 107(d)(3)(E)(ii) and (v)]. EPA must also determine that the improvement in air quality is due to reductions that are permanent and enforceable [section 107(d)(3)(E)(iii)], and that the EPA has fully approved a maintenance plan for the area under section 175A [section 107(d)(3)(E)(iv)]. EPA addressed all these criteria in the proposal to redesignate the Phoenix-Mesa area to attainment for the 1997 8-hour ozone area. The commenter alleges that EPA's analysis is flawed because inclusion of the affirmative defense in the SIP makes the Agency's determination under redesignation criteria at CAA section 107(d)(3)(E)(iii), (iv), and (v) invalid.

As EPA stated in its proposed rule, CAA SIP requirements that are not linked with a particular nonattainment area's

designation and classification, including certain section 110 requirements, are not "applicable" for purposes of evaluating compliance with the specific redesignation criteria in CAA sections 107(d)(3)(E)(ii) and (v). 79 FR at 16739, FN 22. EPA maintains this interpretation because these requirements remain applicable after an area is redesignated to attainment. For at least the past 15 years, EPA has applied this interpretation with respect to requirements to which a state will be subject after the area is redesignated. *See, e.g.,* 73 FR 22307, 22312-22313 (April 25, 2008) (proposed redesignation of San Joaquin Valley; EPA concluded that section 110(a)(2)(D) transport requirements are not applicable under section 110(d)(3)(E)(v) because they "continue to apply to a state regardless of the designation of any one particular area in the state"); 62 FR 24826, 24829-24830 (May 7, 1997) (redesignation of Reading, Pennsylvania, Area; EPA concluded that the additional controls required by section 184 were not "applicable" for purposes of section 107(d)(3)(E) because "they remain in force regardless of the area's redesignation status"). Courts reviewing EPA's interpretation of "applicable" in the context of requirements applicable for redesignation have agreed with the Agency. *See Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004) and *Wall v. EPA*, 265 F.3d 426, 438 (6th Cir. 2001). With respect to the affirmative defense provisions in the Arizona SIP, redesignation

of the area to attainment will in no way relieve the State and Maricopa County of their responsibilities to remove the affirmative defense provisions from the SIP, if EPA later takes action to require correction of the Arizona SIP with respect to the affirmative defense provisions.¹⁵ Because we conclude that the affirmative defense provisions are not applicable requirements for purposes of this redesignation action, the existence of the affirmative defense provisions in the SIP does not undermine our conclusion that the redesignation criteria under section 107(d)(3)(E)(ii) and (v) have been met.

The affirmative defense provisions at issue provide an affirmative defense to monetary penalties for violations due to excess emissions for certain categories of stationary sources during qualifying SSM events.¹⁶ The Sierra Club maintains that the inclusion of these provisions in the SIP renders the emissions limits in the nonattainment SIP and maintenance plan that are subject to the affirmative defense provision unenforceable, thus undermining the Agency's conclusion that the

¹⁵ EPA has proposed, under CAA section 110(k)(5), to find a number of SIPs, including the Arizona SIP, substantially inadequate to meet CAA requirements because the SIP provides an affirmative defense for excess emissions during certain SSM events. See 78 FR 12460, at 12533-12536 (February 22, 2013).

¹⁶ EPA approved the State's SSM affirmative defense rules prior to designating the Phoenix-Mesa Area non-attainment for the 1997 8-hour ozone standard. See [Arizona Administrative Code (AAC) R18-2-310 ("Affirmative Defenses for Excess Emissions Due to Malfunctions, Startup, and Shutdown")] at 66 FR 48087 (September 18, 2001) and Maricopa County's SSM affirmative defense rule [Maricopa County Rule 140 ("Excess Emissions") at 67 FR 54957 (August 27, 2002)]. At the time EPA approved the affirmative defense provisions as a part of the SIP, the Agency believed them to be consistent with CAA requirements.

improvement in air quality is due to permanent and enforceable reductions in emissions as required under section 107(d)(3)(E)(iii), and the conclusion that the maintenance plan will ensure maintenance of the NAAQS prospectively as required under section 107(d)(3)(E)(iv). The Sierra Club did not explain the precise basis for its claim that potential assertion of the affirmative defenses at issue would render the existing EPA approved SIP inconsistent with the criteria under section 107(d)(3)(E)(iii) and (iv), and thus, in effect, invites EPA to determine that the existence in the SIP of affirmative defense provisions, without regard to the types of sources relied upon for attainment and maintenance, per se means that EPA may not make a positive determination with respect to the redesignation criteria under CAA sections 107(d)(3)(E)(iii) and (iv). We do not believe that the redesignation criteria must be interpreted so narrowly, but may be interpreted to account for the larger planning context in a given area.

As noted above, the affirmative defense provisions in the Arizona SIP purport to allow sources to avoid monetary penalties for violations of an applicable emissions limit under certain limited circumstances, but those provisions do not prohibit the state, EPA or citizens from seeking injunctive relief to force a source that is violating the applicable SIP emission limitations to take steps to address the non-compliance. Penalties are not

the only means to address exceedances of a SIP emission limitation, even though the possibility or threat of penalties provides deterrence against violations and may cause a source to agree more readily to correct a problem prospectively. The continued availability of injunctive relief supports EPA's contention that the emissions limits in the SIP are sufficiently enforceable for purposes of redesignation, even though EPA now believes that such affirmative defense provisions in SIPs are not consistent with the CAA and must be revised.

Second, attainment of the 1997 ozone standard in the Phoenix-Mesa area and maintenance of the standard through 2025 primarily rely upon emission limits on mobile and area sources to which the affirmative defense provisions in the Arizona SIP do not apply. For example, all of the specific control measures relied upon by the state for numeric credit for attainment and maintenance planning purposes, with very minor exceptions, apply to mobile and area sources. See figures ES-3 and ES-4 on pages ES-4 and ES-5 in the approved *Eight-Hour Ozone Plan for the Maricopa Nonattainment Area* (June 2007); and figures ES-2 and ES-3 on pages ES-5 and ES-6 in the *Eight-Hour Ozone Maintenance Plan*. These control measures relate to nonroad equipment standards, fuel formulations, and inspection and maintenance (I/M) requirements rather than stationary source controls.

This is not to say that controls on stationary source are not an important part of the overall ozone control strategy in the Phoenix-Mesa area. Rather, the point is that the extent to which individual stationary sources, which might assert an affirmative defense for an SSM event that would likely have occurred even in the absence of an affirmative defense, can affect regional ozone concentrations in the Phoenix-Mesa area is likely limited. For instance, based on the emissions inventory for this area, the highest-emitting individual stationary sources in the Phoenix-Mesa area emit approximately 0.80 metric tons per day (mtpd) of VOC and 2.55 mtpd of NO_x based on the individual facility data for 2005 compiled in appendix A, exhibit 1 of the Eight-Hour Ozone Maintenance Plan. Such emissions constitute approximately 0.12% and 0.94% of the overall regional inventory for VOC and NO_x, respectively.

Moreover, overall point source¹⁷ emissions in the Phoenix-Mesa area constitute only 1.7% and 4.0% of VOC and NO_x emissions, respectively, based on the 2005 inventories presented on pages ES-8 and ES-9 of the Eight-Hour Ozone Maintenance Plan. These values underscore the importance of mobile and area (and biogenic) sources, to which the affirmative defense provisions

¹⁷ The Eight-Hour Ozone Maintenance Plan defines "point sources" as stationary sources that emit 25 (English) tons per year or more of carbon monoxide, 10 tons per year or more of ozone precursors, or 5 tons or more of PM₁₀ or ammonia compounds. See page 11 of appendix A, exhibit 1 of the Eight-Hour Ozone Maintenance Plan.

do not apply, to the regional inventory, and by extension, to regional ozone concentrations. The current design value for the Phoenix-Mesa area, meanwhile, which is equal to the projected design value, is 0.081 ppm, five percent below the applicable NAAQS. Thus, the hypothetical potential for any one individual point source, or even small subset of such sources, to cause a violation of the 1997 ozone standard in the Phoenix-Mesa area due to higher emissions that would likely have occurred in the absence of the affirmative defense provisions, is quite low. For these reasons, we conclude that the affirmative defense provisions in the Arizona SIP do not make the emission limits relied upon for attainment and maintenance unenforceable for the purposes of CAA section 107(d)(3)(E)(iii) and (iv) or otherwise undermine EPA's approval, finalized herein, of the Eight-Hour Ozone Maintenance Plan and related grant of ADEQ's redesignation request for the Phoenix-Mesa area for the 1997 ozone standard.

Sierra Club also contends that EPA has previously found in other actions that illegal SSM provisions constitute grounds for denying redesignation requests and references EPA's December 1, 2009 proposed disapproval of Utah's redesignation requests for Salt Lake County, Utah County, and Ogden City PM₁₀ nonattainment areas (74 FR 62717). However, this aspect of the proposed disapproval, which was one of many deficiencies identified by EPA, was based on the state's inclusion in the submittal of new

SIP revisions that would provide blanket exemptions from compliance with emission standards during SSM events. In the redesignation at issue here, the state did not seek to create new SIP provisions that are inconsistent with CAA requirements as part of its redesignation request or maintenance plan, and the already existing affirmative defense provisions do not purport to preclude all potential forms of enforcement, or to provide a blanket exemption from compliance.

A more analogous action by EPA is the Agency's final redesignation of the Ohio portion of the Huntington-Ashland (OH-WV-KY) nonattainment area to attainment for the fine particulate matter standard ($PM_{2.5}$) standard. See 77 FR 76883 (December 31, 2012). In response to comments challenging the proposed redesignation due to the presence of certain SSM provisions in the Ohio SIP, EPA concluded that the SSM provisions in the Ohio SIP did not provide a basis for disapproving the redesignation request. *Id.*, at 76891, 76892. In so concluding, EPA noted that the SSM provisions and related SIP limits at issue in that state were approved into the SIP and thus were permanent and enforceable for the purposes of meeting the criteria for redesignation, and that EPA had other statutory mechanisms for addressing any problems associated with the SSM measures. EPA emphasizes that the redesignation of the area to attainment does not relieve Arizona of the responsibility to remove legally

deficient SIP provisions either independently or pursuant to a SIP call. To the contrary, EPA maintains that it may determine that the affirmative defense provisions are contrary to CAA requirements and take action to require correction of those provisions even after the area has been redesignated to attainment. This interpretation is consistent with prior redesignation actions. See *Southwestern Pennsylvania Growth Alliance v. EPA*, 114 F.3d 984 (6th Cir. 1998) (Redesignation of Cleveland-Akron-Lorain area determined valid even though the Agency subsequently proposed a SIP call to require Ohio and other states to revise their SIPs to mitigate ozone transport to other states).

As of this time, the State's and Maricopa County's affirmative defense provisions are part of the approved SIP, and EPA is not required to re-evaluate the validity of previously approved SIP provisions as part of this redesignation.¹⁸ If approved SIP provisions are separately determined to be deficient, EPA is able to evaluate those concerns in the appropriate context, and can, if necessary, issue a "SIP call," which triggers a requirement for states to submit a corrective SIP revision.

¹⁸ See September 4, 1992 memorandum entitled "Procedures for Processing Requests to Redesignate Areas to Attainment," from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, at page 3; *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d, 984, 989-990 (6th Cir. 1998); *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001); 68 FR 25418, 25426, May 12, 2003.

EPA acknowledges that we are currently evaluating a petition that pertains to EPA's SSM Policy that interprets the requirements of the CAA with respect to the proper treatment of excess emissions during SSM events in SIP provisions. As part of that process, EPA is separately evaluating the issue of whether states have authority to create, and EPA has authority to approve, any affirmative defense provisions in SIPs. On June 30, 2011, Sierra Club filed a "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions." The petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of SSM. On February 22, 2013, EPA proposed to grant in part and deny in part the request in the petition to rescind its policy interpreting the CAA to allow states to have appropriately drawn SIP provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM (78 FR 12460). EPA also proposed either to grant or to deny the petition with respect to the specific existing SIP provisions related to SSM events in each of the 39 states identified by the Sierra Club as inconsistent with the CAA. In this context, EPA has proposed to grant the petition with respect to both the State's and Maricopa County's affirmative defense provisions for startup and shutdown periods, and to deny

the petition with respect to the arguments concerning the agencies' affirmative defense provisions for periods of malfunction. Under EPA's February 2013 proposal, a schedule has been proposed for states to submit corrective SIP revisions.

The Sierra Club also argues that the *Cement Kiln Decision*, issued by the D.C. Circuit Court of Appeals on April 18, 2014, prevents EPA from approving any affirmative defense provisions in SIPs because they are inconsistent with CAA provisions relevant to citizen enforcement under sections 113 and 304. In the decision, the D.C. Circuit vacated affirmative defense provisions applicable to violations due to unavoidable malfunctions provided in EPA's standard for emissions from Portland cement plants.¹⁹ The court concluded that sections 113 and 304 preclude EPA from creating such affirmative defense provision in its own regulations because it would purport to alter or eliminate the jurisdiction of federal courts to assess civil penalties for violations of CAA requirements. EPA is currently analyzing this opinion and is evaluating its impact on our interpretation of the CAA regarding the permissibility of affirmative defenses in SIP provisions, including those applicable to malfunctions. In the event that EPA determines that no affirmative defense provisions are permissible in SIPs,

¹⁹ National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 78 FR 10006 (February 12, 2013).

the Agency will have the authority and discretion to require the states to remove deficient provisions from the SIPs pursuant to section 110(k)(5). EPA maintains that this concern is better addressed through the exercise of that authority, than through its authority to redesignate areas that otherwise attain the NAAQS and meet the requirements of section 107(d)(3), consistent with EPA's long standing approach to evaluating requests for redesignation to attainment.

In conclusion, with regard to the redesignation of the Phoenix-Mesa area, Arizona has a fully approved SIP. The provisions that the Sierra Club objects to do not preclude EPA's determination that the emissions reductions that have provided for attainment and that will provide for maintenance of the 1997 8-hour ozone standard in the Phoenix-Mesa area are permanent and enforceable, as those terms are meant in section 107(d)(3) of the CAA, or that the state has met all applicable requirements under section 110 and part D for the purposes of redesignation. In addition, the area has attained the 1997 8-hour ozone standard since 2007, and has demonstrated it can maintain compliance with the standard for at least 10 years after redesignation to attainment. EPA notes, moreover, that it is approving contingency provisions under section 175A(d) as part of the area's maintenance plan. The contingency element of the maintenance plan provides assurance that the area can promptly

correct a violation that might occur after redesignation.

Finally, EPA is addressing the affirmative defense provisions in the Arizona SIP in separate action or actions, and redesignation of the area to attainment will in no way relieve the State and Maricopa County of their responsibilities to remove the affirmative defense provisions from the SIP, if EPA later takes final action to require such revisions to the Arizona SIP.

III. Final Action

Under CAA section 110(k)(3), and for the reasons provided above and in the proposed rule, EPA is approving ADEQ's submittal dated March 23, 2009 of the *MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area* (February 2009) ("Phoenix-Mesa Eight-Hour Ozone Maintenance Plan") as a revision to the Arizona SIP. In connection with the Phoenix-Mesa Eight-Hour Ozone Maintenance Plan, EPA finds that the maintenance demonstration showing how the area will continue to attain the 1997 8-hour ozone NAAQS for 10 years beyond redesignation (i.e., through 2025) and the contingency provisions meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A.

EPA is also finding adequate and approving the motor vehicle emissions budgets (MVEBs) from the Eight-Hour Ozone Maintenance Plan for transportation conformity purposes because

we find that they meet the applicable transportation conformity requirements under 40 CFR 93.118(e). The MVEBs are 43.8 metric tons per day (mtpd) of VOC and 101.8 mtpd of NO_x. They include a 10% safety margin, and correspond to the peak episode day (Thursday) in June 2025 that was used to model maintenance of the 1997 8-hour ozone NAAQS in the Phoenix-Mesa area in the Eight-Hour Ozone Maintenance Plan.

These new MVEBs become effective on the date of publication of this final rule in the Federal Register (see 40 CFR 93.118(f)(2)) and must be used by U.S. Department of Transportation and the Maricopa Association of Governments for future transportation conformity analyses for the Phoenix-Mesa area with applicable horizon years after 2024. The existing 2008 VOC and NO_x MVEBs established in MAG's approved Eight-Hour Ozone Attainment Plan also remain in effect. On-road motor vehicle emissions in any required analysis years up to and including 2024 cannot exceed levels established by those previously-approved MVEBs.

Second, under CAA section 107(d)(3)(D), we are approving ADEQ's request, which accompanied the submittal of the maintenance plan, to redesignate the Phoenix-Mesa 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone

NAAQS.²⁰ We are doing so based on our conclusion that the area has met the five criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion in this regard is in turn based on our determination that the area has attained the 1997 ozone NAAQS; that relevant portions of the Arizona SIP are fully approved; that the improvement in air quality is due to permanent and enforceable reductions in emissions; that Arizona has met all requirements applicable to the Phoenix-Mesa area with respect to section 110 and part D of the CAA; and that the area has a fully approved maintenance plan meeting the requirements of CAA section 175A (i.e., the Eight-Hour Ozone Maintenance Plan approved herein).

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment under section 107(d)(3)(E) and the accompanying approval of a maintenance plan as a SIP revision under section 110(k)(3) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. Redesignation to attainment does not in and of itself create any new requirements, but rather results

²⁰ As noted in our proposed rule at 79 FR 16736, EPA has lowered the 8-hour ozone standard to 0.075 ppm (the 2008 8-hour ozone standard), and has designated the Phoenix-Mesa area as marginal nonattainment for the 2008 8-hour ozone standard. Today's action redesignates the Phoenix-Mesa area as attainment for the 1997 8-hour ozone standard only. The Phoenix-Mesa area remains nonattainment for the more stringent 2008 8-hour ozone standard until redesignated for that standard.

in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, these actions merely approve a State plan and redesignation request as meeting federal requirements and do not impose additional requirements beyond those imposed by state law. For these reasons, these actions:

- Are not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Nonetheless, in accordance with EPA's 2011 Policy on Consultation and Coordination with Tribes, EPA has discussed the

actions with the three Tribes located within the Phoenix-Mesa 8-hour ozone nonattainment area: the Fort McDowell Yavapai Nation, the Salt River-Pima Maricopa Indian Community, and the Tohono O'odham Nation.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it

extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: August 20, 2014.

Jared Blumenfeld,
Regional Administrator,
Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52— APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D — Arizona

2. Section 52.120 is amended by adding paragraph (c)(160) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(160) The following plan was submitted on March 23, 2009, by the Governor's designee.

(i) [Reserved]

(ii) Additional materials.

(A) Arizona Department of Environmental Quality.

(1) *MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area* (February 2009), adopted by the Arizona Department of Environmental Quality on March 23, 2009, excluding the appendices.

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PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

3. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

4. Section 81.303 is amended by:

a. Removing the table heading "Arizona-Ozone (Arizona-1997 8-Hour Ozone NAAQS (Primary and Secondary))" and adding in its place "Arizona-1997 8-Hour Ozone NAAQS (Primary and Secondary)"; and

b. In the newly headed table "Arizona-1997 8-Hour Ozone NAAQS (Primary and Secondary)," under "Phoenix-Mesa, AZ:" revising the entries for "Maricopa County (part)" and "Pinal County (part)".

The revision reads as follows:

§ 81.303 Arizona.

* * * * *

Arizona–1997 8-Hour Ozone NAAQS (Primary and Secondary)

Designated area	Designation ^a		Category/classification	
	Date ¹	Type	Date ¹	Type
Phoenix-Mesa, AZ:				
Maricopa County (part)	[Insert date 30 days after date of publication in the Federal Register]	Attainment		
T1N, R1E (except that portion in Indian Country); T1N, R2E; T1N, R3E; T1N, R4E; T1N, R5E; T1N, R6E; T1N, R7E; T1N, R1W; T1N, R2W; T1N, R3W; T1N, R4W; T1N, R5W; T1N, R6W; T2N, R1E; T2N, R2E; T2N, R3E; T2N, R4E; T2N, R5E, T2N, R6E; T2N, R7E; T2N, R8E; T2N, R9E; T2N, R10E; T2N, R11E; T2N, R12E (except that portion in Gila County); T2N, R13E (except that portion in Gila County); T2N, R1W; T2N, R2W; T2N, R3W; T2N, R4W; T2N, R5W; T2N, R6W; T2N, R7W; T3N, R1E; T3N, R2E; T3N, R3E; T3N, R4E; T3N, R5E; T3N, R6E; T3N, R7E; T3N, R8E; T3N, R9E; T3N, R10E (except that portion in Gila County); T3N, R11E (except that portion in Gila County); T3N, R12E (except that portion in Gila County); T3N, R1W; T3N, R2W; T3N, R3W; T3N, R4W; T3N, R5W; T3N,				

R6W; T4N, R1E; T4N, R2E; T4N, R3E; T4N, R4E; T4N, R5E; T4N, R6E; T4N, R7E; T4N, R8E; T4N, R9E; T4N, R10E (except that portion in Gila County); T4N, R11E (except that portion in Gila County); T4N, R12E (except that portion in Gila County); T4N, R1W; T4N, R2W; T4N, R3W; T4N, R4W; T4N, R5W; T4N, R6W; T5N, R1E; T5N, R2E; T5N, R3E; T5N, R4E; T5N, R5E; T5N, R6E; T5N, R7E; T5N, R8E; T5N, R9E (except that portion in Gila County); T5N, R10E (except that portion in Gila County); T5N, R1W; T5N, R2W; T5N, R3W; T5N, R4W; T5N, R5W; T6N, R1E (except that portion in Yavapai County); T6N, R2E; T6N, R3E; T6N, R4E; T6N, R5E; T6N, R6E; T6N, R7E; T6N, R8E; T6N, R9E (except that portion in Gila County); T6N, R10E (except that portion in Gila County); T6N, R1W (except that portion in Yavapai County); T6N, R2W; T6N, R3W; T6N, R4W; T6N, R5W; T7N, R1E (except that portion in Yavapai County); T7N, R2E; (except that portion in Yavapai County); T7N, R3E; T7N, R4E; T7N, R5E; T7N, R6E; T7N, R7E; T7N, R8E; T7N, R9E (except that portion in Gila County); T7N, R1W (except that portion in Yavapai County); T7N, R2W (except that portion in Yavapai County); T8N, R2E (except that portion in Yavapai County); T8N, R3E				
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(except that portion in Yavapai County); T8N, R4E (except that portion in Yavapai County); T8N, R5E (except that portion in Yavapai County); T8N, R6E (except that portion in Yavapai County); T8N, R7E (except that portion in Yavapai County); T8N, R8E (except that portion in Yavapai and Gila Counties); T8N, R9E (except that portion in Yavapai and Gila Counties); T1S, R1E (except that portion in Indian Country); T1S, R2E (except that portion in Pinal County and in Indian Country); T1S, R3E; T1S, R4E; T1S, R5E; T1S, R6E; T1S, R7E; T1S, R1W; T1S, R2W; T1S, R3W; T1S, R4W; T1S, R5W; T1S, R6W; T2S, R1E (except that portion in Indian Country); T2S, R5E; T2S, R6E; T2S, R7E; T2S, R1W; T2S, R2W; T2S, R3W; T2S, R4W; T2S, R5W; T3S, R1E; T3S, R1W; T3S, R2W; T3S, R3W; T3S, R4W; T3S, R5W; T4S, 1E; T4S, R1W; T4S, R2W; T4S, R3W; T4S, R4W; T4S, R5W.				
Pinal County (part)	[<u>Insert date 30 days after date of publication in the Federal Register</u>]	Attainment		
Apache Junction: T1N, R8E; T1S, R8E (Sections 1 through 12)				
*	*	*	*	*

^a Includes Indian Country located in each county or area, except as otherwise specified.

¹ This date is June 15, 2004, unless otherwise noted.

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